No. 92-170

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MARVINELL BROWN -
PETITIONER

VS.

HOUSTON INDEPENDENT SCHOOL DISTRICT -
RESPONDENT

REPLY BRIEF
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT (91-2634)

REPLY BRIEF TO BRIEF IN OPPOSITION

MARVINELL BROWN, PRO SE
5611 WESTWARD #66
HOUSTON, TEXAS 77081
(713) 986-9358

25 pp

TABLE OF CONTENTS

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

Texas Education Code p. 7

CONTENT OF REPLY BRIEF

New Issues raised by Brief In Opposition p. 1

Issues Respondent & Lower Courts failed to address p. 9

REASONS FOR GRANTING THE WRIT .....

14th Amendment-Due Process pp. 1, 6, 9-15

'Indefinite medical health leave' pp. 1, 2, 7, 8, 9, 15

1st Amendment-Freedom of Speech pp. 2, 6, 20

Right-to-Sue, Equitable Tolling, Sec. 1983 p. 18

Conflicting Psychiatric Reports pp. 2, 15-17

CONCLUSION.....19

TABLE OF AUTHORITIES

CASES — PAGE

Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 106 S.Ct. 2505 (1986). 6

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L Ed 996 6

Board of Regents of State Colleges v. Roth 408 U.S. 574; 92 S.Ct. 2701 (1972). 6

Cleveland Bd. of Educ. v Loudermill 470 U.S. 532; 105 S.Ct. 1487 (1985). 5, 7, 10

Coppage v Kansas (1915) 236 U.S. 1, 59 LE d 441 19

Daury v. Smith 842 F.2d 9 (1st Cir.1988) 13, 17

Givhan v Western Line Consolidated School District 439 US 410, 58 L Ed 2d 619 (1979). 2

Honore v. Douglas, 833 F.2d 570 (5th Cir. 1987). 18

Jones v. Western Geophysical Co. of America, 669 F.2d 280 (5th Cir. 1982). 17

Kelly v Johnson 47 LE d 975 (1976) 20

Levitt v. University of Texas at El Paso 759 F.2d at 1228 (1985). 7

Lombard v. Board of Education of City of New York, 502 F.2d at 637, 638 (2nd Cir. 1974). 14

Pickering v. Board of Education, 391 U.S. 563; 88 S.CT. 1736 (1968) 20

Poller v Columbia Broadcasting System 368 US 464, 7 L Ed 458 (1962). 5

Thompson v. Southwest Sch. Dist., 483 F.Supp. 1170 (W.D. Mo. 1980) 12

United States v. Diebold, Inc., 369 US 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). 6

Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773 (9th Cir. 1982). 15

Wells v. Dallas Independent School District 793 F.2d at 682 (1986). 8, 11

The White Motor Company v United States, 372 US 253, 9 L Ed 2d 738, 83 S Ct. 696 18

Zipes v. Trans World Airlines, Inc. 455 U.S. 385; 102 S.Ct. 1127 (1982). 18

Petitioner, Marvinell Brown, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals Fifth Circuit refusing to acknowledge there was not even minimum due process given before Brown was denied her property interest, liberty interest, and freedom of speech.

Respondent HISD's Brief in Opposition failed to 'put to rest' any of the questions raised by Petitioner. Plaintiff Brown finds it necessary to file this Reply Brief because of the Respondent's and lower courts' failure to address the reasons for referral and 'reasonable basis' for referral. Reply is also required because Respondent HISD raised a new issue by seeking to befuddle an established and proven fact-there was only one expert calling for Brown's removal from the classroom. Brown has alleged constitutional infirmity because of the arbitrary and capricious reasons with no nexus given. The Respondent has evaded these 'reasons' issues, numerous due process issues, and **left Brown hanging on the unsettled question of forced medical leave.**

HISD also failed to put the 1st and 14th Amendment issues to rest. The Fifth Circuit assumed Brown's speech

to police was of public concern but her protest to police and principals made communication to be private nature and not protected by the 1st Amendment. This is error. "A public employee does not forfeit his First Amendment protection against governmental abridgment of freedom of speech when he arranges to communicate privately with his employer rather than to express his views publicly. . . Pickering, Perry, and Mt. Healthy do not support the Court of Appeals' conclusion that private expression is unprotected by the First Amendment" Givhan v Western Line Consolidated School District, 439 US at 410 (1979).

The Respondent is seeking to confuse the Supreme Court by implying there was more than one professional calling for Brown's removal. The Respondent wrote "Dr. Mattye Glass, a psychiatrist employed by the Respondent, originally made the recommendation that the Petitioner be placed on medical leave. . . . Dr. Robinson also recommended that the Petitioner be placed on medical health leave." (Opposition Brief, p. 18) Throughout the opposition brief, Respondent attempted to befuddle an established fact-one expert for removal vs. three experts for reinstatement. Dr. Glass' function was only to determine whether Brown

should see a psychiatrist and to serve as a 'coordinator' of an evaluation. Explaining about the employee referral process, Glass substantiated this and wrote "An appointment for a conference is scheduled by the Bureau of Health with the referred employee. . .During the conference, the employee is informed if a medical evaluation is indicated. . . The referred employee may select a physician of choice approved by the Bureau of School Health." (Tr. p. 273) Glass carried out the above steps in Brown's case. This evidence proves the Respondent is wrong about the new 'two experts' issue. The record identifies Glass as a 'director'. Glass, Principal Dr. Jones, and HISD Janet Price (EEOC letter 3/17/89) wrote letters making it clear that based solely on Dr. Robinson's professional opinion Brown should be removed from the classroom. (Tr. 257, 267, 562) No where in the record is there indication that Dr. Glass called for Brown's removal. After the first conference, Glass stated "It has been recommended that Mrs. Brown receive a medical evaluation" (Tr. pp. 153 (affidavit), 174). Later, Glass clearly stated "It was the professional opinion of Dr. Robinson that Ms. Marvinell Brown should be restricted from the classroom until further evaluation".

(Tr. p. 257) Brown had not been given the reasons for referral until after she had her first conference with Glass. Consequently, Glass did not have enough information to even make any evaluation or recommendation. In a different letter, Glass stated a third evaluation may be warranted; this implies that Glass had not done an evaluation but only Robinson and Wade had. (Petition Writ p. A-8)

The Respondent attempted to further mislead the Supreme Court by claiming that Brown independently chose Robinson. This Reply Brief is needed to clarify that HISD rejected Brown's first choice of Psychologist Robert Bell and said she must select a psychiatrist. (Tr. p. 270). At that time there were only two black psychiatrists in Houston and Dr. Robinson was one of them.

Even though HISD evaded the reasons for referral issue, Brown has alleged the reasons were arbitrary and capricious, without a nexus or a reasonable basis. Because Brown did not know the reasons for referral, she was not able to defend herself to Glass. The Fifth Circuit wrote "After she was referred to Health Services but before she chose a psychiatrist, Ms. Brown was told of the reasons for the referral." (Petition Writ, p. A-4) This is true. Glass'

misstatement also proved Brown did not know the reasons for referral before actual referral: "I also provided Ms. Brown with the reasons why she had been referred" (Tr. p. 153) The record shows that as of December 5, 1988, about a week after Brown met with Glass, Brown still had not received reasons for referral. (Tr. p. 270) Therefore, proper notice was not given as required by Cleveland Bd. of Educ. v. Loudermill 470 US 532; 105 S Ct. 1487 (1985).

The 5th Circuit evidently misapprehended facts. Three psychological experts using testing, DSM III-R, and at least 5 observations recommended that Brown be reinstated; while only one psychological expert who used no safeguards such as testing, other professionals' opinions, DSM III-R standard, or even more than one observation (Tr. pp. 38, 261) recommended Brown be removed from the classroom because of 'irrational' thoughts. (Tr. pp. 10, 17, 27, 35, 74, 95, 96, 222, 241, 253, 254, 563, 564,) This is clearly error that this 5th Circuit affirmed summary judgment for the moving party based on these facts. The Supreme Court has mandated that the record, issues, etc. should be "examined in the light most favorable to the plaintiff opposing the motion". Poller v Columbia

Broadcasting System 368 US 464, 7 L Ed 458 (1962); United States v. Diebold, Inc., 369 US 654, 8 L Ed 2d 176 (1962).

It was not the function of the district judge or the Fifth Circuit judges, in ruling on a motion for summary judgment, to weigh evidence, assess credibility, or determine the most reasonable inference to be drawn from the evidence. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986).

Brown cited authority showing that summary judgment is not appropriate for settling 1st and 14th Amendment cases. (Petition Writ pp. 4, 26, 27, 29) "When a state directly impinges upon interests in free speech or free press, an opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards." Board of Regents v Roth, 408 US 564; 33 L Ed 2d 548 (1972). A hearing in court is required to address free speech issue. Bishop v. Wood 48 L Ed 2d at 998. With Brown's case, there is not even the appearance of justice-the lower court judges would not allow hearings or trial.

Neither the Respondent or the district court mentioned the word 'hearing' in their arguments; this makes sense because there was no hearing. Incorrectly deciding there was a hearing, the Fifth Circuit stated:

"Ms. Brown was given notice of the reasons for her referral and her subsequent placement on health leave. She was afforded the opportunity to give Dr. Glass her perspective on the events leading to the concern for fitness to teach. She was allowed to present evidence to Dr. Glass, and we note that Dr. Glass acknowledged that if Ms. Brown pursued evaluation further, then a third psychiatric opinion might have been warranted. In short, she was given pretermination notice and hearing" (Petition Writ, p. A-8)

Ironically, the Fifth Circuit had established that "After she was referred to Health Services but before she chose a psychiatrist, Ms. Brown was told of the reasons for the referral." (Petition Writ, p. A-4) So, proper notice or employer's evidence was not given. Cleveland Bd. of Educ. v. Loudermill 470 US 532; 105 S Ct. 1487

But Texas Education Code indicates that Brown should have been given a hearing before the HISD board, opportunity to hear the evidence upon which the charges are based, to cross-examine all adverse witnesses. (Petition Writ, pp. G-2, G-3) The Fifth Circuit lowered its standard when this court determined that conferences with Dr. Glass were 'due process hearings'. Why didn't this 5th Circuit use THEIR very own Wells and Levitt as a standard for

authority? Wells v. Dallas Independent School District 793 F.2d at 683 (5th Cir., 1986).

HISD resorted to unlawful means and committed constitutional violations to remove a 'good' tenured teacher. HISD forced Petitioner Brown on medical leave because of supposedly 'mental incapacity'. **How long will Brown hang on this forced 'medical leave'?** Because Brown has been forced to remain on 'medical leave' for nearly four years, the supervision of this Court is needed to determine the constitutionality of this forced and unsolicited medical leave. Brown is the only party that has addressed this 'forced medical leave' issue. Ironically, the Respondent and the 5th Circuit claimed Brown 'is' still an employee. BUT, Brown has been denied her property interest, liberty interest-no job, and her good name-a person free of mental illness. The Appeals Court even wrote "As far as the record shows, in fact, Ms. Brown still has not been terminated" (Petition Writ, A-8). HISD remains silent on this issue and has reason to remain silent because of their heinous intent; afterall, Brown has been gone from HISD for almost 4 years and the lower courts will not uphold the constitution. The supervisory powers of the Supreme Court

are needed to put to rest the **unsettled question of Brown's indefinite medical leave.** There have been no hearings; a 'communist style' coupe removed Brown without notice. Brown has been in the classroom since the 'removal'; nothing 'bad' occured. Currently unemployed, Brown has a bachelors degree in math and masters degree in computer literacy. There is no question that HISD's actions have been devastating to Brown's career. Some school is hurting because a math and computer literacy teacher has been denied her liberty to work. How long will Brown be left hanging on 'indefinite medical health leave'? Supreme Court's intervention is imperative.

ISSUES LOWER COURTS AND RESPONDENT FAILED TO ADDRESS

Due Process

(1) Lower courts used summary judgment to settle constitutional case--1st and 14th Amendments (2) District court's refusal to have a hearing or trial on the merits (Brown's Brief pp. 2, 6, 12, 16); (Tr. pp. 10, 12, 14, 89)

HISD's refusal to act on grievances (Brown's Brief p. 14). Principal Don Jones actually documented that Brown would not receive due process; he wrote "Under these

circumstances I will not proceed with your grievance until these matters are resolved." (Tr. p. 283). Brown has never been able to face her accuser- Principal Jones.

Superintendent-District I, Ruben Lopez, also denied Brown due process; he wrote "Please be advised that I do not plan to respond to your grievance until your medical problems are resolved in accordance to Houston Independent School District procedures" (Tr. p. 284).

Brown went to all levels to present her side. Brown even wrote to the Board asking for a hearing; she was ignored-no response from the Board. (Tr. pp. 110, 289, 290). The lower courts seemed unbothered and tolerate of the fact that Brown had no appeal or grievance rights. Brown has not been able to present her side as required by Cleveland Bd. of Educ. v. Loudermill 470 US 532.

Brown was denied counsel prior to adverse actions; Brown had asked Dr. Jones to wait until she obtained an attorney. (Brown's Brief p. 4); (Tr. p. 31)

Conferences held with Dr. Glass do not and cannot constitute due process hearings as 5th Circuit stated. How could the first conference with Glass be considered a hearing considering both the 5th Circuit and Brown have

acknowledged that Brown was not given reasons for referral until after conference with Dr. Glass? How could Brown defend against reasons that she was not told about until 2 weeks after the first conference? The other and last conference with Glass was for the sole purpose of Brown receiving documentation. Glass refused to give her copies. (Tr. p. 255).

Arbitrary & capricious reasons issue with no Nexus- Brown has been the only party that argued the reasonable basis, arbitrary & capricious reasons, and nexus issues. (Appellant's pp. 25, 26, & 27); (Tr. pp. 93, 94, 239, 266, 347) The lower courts overlooked these monumental issues. Brown gave evidence that the late reasons were merely manufactured, pretextual, and vague. Due process requires that the given reasons for adverse action be not vague; the reasons Jones gave are very unclear and have been rebutted. The 5th Circuit has stated that "vague charges permit conflicting inferences. . . .entry of summary judgment was therefore in error". Wells v. Dallas Independent School District 793 F.2d at 683. Brown was performing her teaching duties well; students were learning and performed well on tests. (Tr. pp. 262, 263, 264). Respondent has

made no claim that Brown was not performing her job adequately. (Tr. pp. 266, 347). The lower courts erred in not requiring a nexus in relation to HISD's removal of Brown; the reasons given by Jones revealed no nexus. (Tr. pp. 93, 239, 266, 267, 343, 352). The courts have insisted that there be a nexus between the teacher's behavior and its effect upon the school. Furthermore, this is a way of preventing to avoid the constitutional vice of vagueness, and as a way of assuring that the basis of the adverse action is rationally related to the legitimate school purposes, the courts have insisted that there be a nexus between the teacher's behavior and an effect upon the school. Thompson v. Southwest Sch. Dist., 483 F.Supp. 1170 (W.D. Mo. 1980). The Respondent has presented no evidence that Brown experienced disciplinary problem in the classroom nor was there evidence of a hostile atmosphere undermining her authority.

Reasonable Basis for Referral-The lower courts did not consider whether HISD had a 'reasonable basis' for referring Brown. The Respondent created another new issue and claimed that the "reasonable basis for referral" issue is not a legally cognizable claim. (Brief Opposition,

p. 2). Authority indicates that if HISD did not have a reasonable basis for referral, then constitutional infirmity is present. The 1st Circuit wrote "A school committee, therefore, may justifiably compel a teacher or administrator to submit to a psychiatric examination as a condition of continued employment if the committee has reason to believe that the teacher or administrator may be jeopardizing the welfare of students under his or her supervision." Daury v. Smith 842 F.2d 9 (1st Cir. 1988). How did Brown's supposedly 'mental disorder' affect her classroom behavior? How were Brown's teaching performance detrimental to students or school? **All authority show that Brown's alleged teacher's performance must have effect on the school or students.**

Liberty Interest (Brown's Brief pp. 10-12); (Tr. pp. 18, 97; pp. 236, 238, 240, 242)

What specifically is or what was Brown's mental disorder? (Brown's Brief pp. 11, 28, 31, 35). This mental illness or stigma placed on Brown has done her grievous harm. Brown has not been able to defend against such a

damaging label. No party including the 5th Circuit has identified Brown's mental illness. Brown deserved even more than minimum due process procedures when she was denied her liberty. What a horrible label especially when not supported by fact!

Judge Gurfein, writing for a unanimous panel, concluded about Plaintiff Lombard the following:
"he was deprived of his reputation as a person who was presumably free from mental disorder. Without his being given the right to confront witnesses, . .This is not only a finding but a stigma. If it is unsupportable in fact, it does grievous harm to petitioner's chances for further employment, as indeed the record demonstrates, and not only in the teaching field. For that reason he was entitled to a full hearing. . .A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding." Lombard v. Board of Education of City of New York, 502 F.2d at 637, 638 (2nd Cir. 1974).

HISD stigmatized Brown by removing her from the classroom midyear. Many employers are skeptical of Brown and wonder why HISD did not wait until the end of the year. What did Brown do that was so detrimental to warrant a midyear removal or termination? After all, Brown remained on the Lee campus almost 2 months after the initial referral. This midyear removal has made it very difficult for Brown to obtain comparable employment.

(Brown's Brief p. 12); (Tr. p. 97) A pretermination hearing was required. Prospective employers were told of Brown's 41 'sick' days. Brown wrote "HISD tells future employers about (Plaintiff) tak. g 41 days of sick leave, this stigmatizing information is false and misleading. Plaintiff was forced to take those 'sick' days" (Tr. p. 242). Under these principles, petitioner's midyear dismissal implicated a protectible liberty interest. Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773 (9th Cir. 1982).

Jones had a security guard to watch Brown as she retrieved her essentials after the coupe. Students and other teachers witnessed the security guard watching and guarding Brown after Jones without giving her notice told her to leave the campus. Security guard's presence implicated Brown was dangerous. (Tr. pp. 12, 92, 237); (Brown's Brief p. 13). What did the other teachers and students think and who did they tell?

Conflicting Psychiatric Reports (Brown's Brief pp. 7, 29, 37); (Tr. pp. 4, 10, 17, 27, 35, 95, 96, 240). Neither the lower courts or the Respondent addressed the conflicting psychiatric reports issue and Robinson's negligence. These issues have not been put to rest. A

credible psychiatric recommendation endorsed by two other psychological professionals recommended Brown's immediate reinstatement. Conversely, only one negligent psychiatric report (Tr. pp. 38, 261) recommended Brown's removal. (Brown's Brief pp. 4, 7, 25, 30, 75, 95, 96, 111)

Robinson failed to use safeguards such as psychological testing, more than one observation, or even a standard such as the DSM III-R. Brown's expert witness, Dr. John Wade, who used safeguards such as the DSM III-R, psychological testing, and other psychological professionals opinions, recommended that Brown be reinstated (Tr. pp. 70, 75, 96, 185, 242,, 255). The 5th Circuit erred in making all inferences in favor of the defendant-party HISD requesting summary judgment.

The Respondent and the lower courts failed to address the motive/intent issue. Did HISD have a reasonable basis in referring Brown? No, HISD's motive and intent was simply to unlawfully terminate Brown. Why did Dr. Glass and HISD reject Dr. Wade's recommendation and accept the negligent evaluation of Dr. Robinson? Why was Robinson and not HISD school board invested with such authority to remove Brown? Robinson only saw Brown on

one occasion. Glass arbitrarily claimed to have rejected Dr. Wade's recommendation because he made it solely on Brown's account. This is contrary to Daury. But we saw where Daury was immediately reinstated even with his doctor basing his opinion on only Daury's account. Daury v. Smith 842 F.2d 12 (1st Cir. 1988). The 11th Circuit found no problem in Daury's doctor basing his evaluation only on Daury's account. Recall that HISD removed Brown based only on an incompetent evaluation conducted by Robinson. Why didn't Glass challenge Robinson's negligence of no testing or other safeguards? Other HISD employees that have been referred and removed had psychological testing. Glass actions are suspective; her refusal to recommend reinstatement for Brown was surely arbitrary and capricious. Why didn't the court question HISD's motive or intent? HISD's decisions to refer Brown and to reject Dr. Wade's recommendation and to accept Robinson's questionable evaluation presented genuine issues of fact as to the employer's motive and intent that should decided by the factfinder at a trial on the merits. Jones v. Western Geophysical Co. of America, 669 F.2d 280 (5th Cir. 1982). The 5th Circuit stated that motivation and intent can only

be proved through circumstantial evidence, determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder. 5th Circuit had made it clear that summary judgment is "likewise an inadequate procedure for sorting out nebulous questions of motivation" Honore v. Douglas, 833 F.2d at 569 (5th Cir. 1986). Summary judgments have a place though they are not appropriate "where motive and intent play leading roles" The White Motor Company v. United States 372 US 253, 9 L Ed 2d 738. The district court-Judge Harmon never mentioned Dr. Wade; but the 5th Circuit does acknowledge Dr. Wade's recommendation, but failed to acknowledge the conflicting inferences. Did the lower courts reject Wade's report or were the courts being partisan? The genuine issue of material fact consisting of conflicting psychiatric reports cannot be settled in a summary judgment forum.

Equitable Tolling & Section 1983 -Brown has argued that equitable tolling was in order so that Brown could receive the protection of Title VII. Zipes v. Trans World Airlines, Inc. 455 U.S. 385; 102 S.Ct. 1127 (1982) Despite the district court's clerk's error with the receipt of

Brown's right-to-sue letter (Brown's Brief p.18) (Tr. pp. 4, 6, 10) and uncontrollable problems with two previous/hired attorneys, the lower courts failed to even consider equitable tolling as some Supreme court cases dictate. Brown has alleged that the lower courts have been too harsh and stringent in denying Brown the protection of Title VII, Section 1981, and Section 1983. Brown proved her entitlement to protection. (Petition Writ, pp. 50-55) Is a summary dismissal in order? There just has not been even the appearance of justice.

CONCLUSION-HISD has unconstitutionally denied Brown her blessed God-given and American opportunity of liberty to work in her profession. Brown has provided HISD 3 psychological professionals' recommendations calling for reinstatement to one negligent recommendation.

The Fourteenth Amendment recognizes "liberty" and "property" as coexistent human rights and debars the states from any unwarranted interference with either. Coppage v Kansas (1915) 236 U.S. 1, 59 LE d 441. The constitutional requirement of due process in safeguarding the liberty of the citizen against deprivation through the action of a state was held to embody the fundamental

conceptions of justice which lie at base of the civil and political institutions in the United States. Kelly v Johnson, 47 LE d 975 (1976).

The 5th Circuit stated "Ms. Brown's calling the police apparently precipitated the referral to Health Services" (Petition Writ, p. A-4). Even though the 5th Circuit acknowledge a retaliatory motive; nevertheless, this circuit affirmed summary judgment for the respondent.

Pickering v Board of Education (1968) 391 US 563, 20 L Ed 2d 811 dictates that the teacher's exercise of right to speak on issues of public importance could not furnish the basis for his or her dismissal which would violate the teacher's right to free speech. Brown's case could have a very chilling fact on teachers around the country. Teachers will be afraid. Petitioner Brown prays that this Honorable Supreme Court defends her rights as an American citizen and realizes she is a child of the King. Brown is respectfully asking for summary dismissal or for Petition for Writ of Certiorari to be granted. Either one could set Brown loose; she is hanging on indefinite medical leave. Brown is appreciative for time given to her case.

Lawyers grow reluctant to take job bias cases

By STEVEN A. HOLMES
New York Times

ALBANY, Ga. — John Henry Smith Sr., a black employee of the Dougherty County Health Department, wanted to sue his employer with a claim of racial bias when he was passed over for a promotion.

But, like an increasing number of people who want to file such suits, he could not afford the upfront cost of a lawyer and could not find one willing to take his case on a contingency basis.

He tried several lawyers in Albany, Ga. Then he tried in Athens, Atlanta, Columbus and Macon. The last one turned him down two weeks before the statute of limitations on his case was to run out.

Frantic, Smith decided to represent himself, though he is a high school dropout with a General Educational Development certificate. So far, by spending late nights in the local courthouse library, reading law books, Smith has managed to file the necessary court papers.

"It takes a whole lot of time 'cause you don't know what you're doing," he said. "But you kind of educate yourself as you go along."

As the nation wrestles intellectually and politically with the issue of civil rights, the legal system appears to be growing increasingly inhospitable toward individual race and sex discrimination cases.

Lawyers more and more are turning away such cases, say experts in employment law and lawyers representing plaintiffs and employers.

They say the cases are time-consuming, difficult to win and bring far less money than other civil litigation like personal injury suits, which permit punitive damages.

Lawyers say, moreover, that they face increasingly conservative judges who are bored by, if not downright hostile to, such cases.

While much of the evidence is anecdotal, a survey conducted in May by the National Employment Lawyers Association, a group made up of about 1,000 lawyers for plaintiffs, found that 44 percent of its members rejected more than 90 percent of the job-discrimination cases that had been brought to them.

Last year, a committee of lawyers and judges appointed by Congress to study the federal court system noted that the monetary stakes in some job-discrimination cases might be so small that "even with the potential to recover attorneys fees, claimants sometimes find it difficult to litigate in federal court because they cannot find counsel to take their cases."

Sometimes, but not often, plaintiffs who cannot find lawyers receive court-appointed counsel. Sometimes they then elect to represent themselves, though they tend to be unschooled in the legal complexities.

"They're getting killed in court," Dallas civil rights lawyer Jeanette Johnson said of the poor blacks and women who represent themselves. "It's like sheep to the slaughter."

Most often, experts say, those who seek to bring such cases simply abandon the thought of getting any redress in the federal courts.

"What happens is that they end up not being able to enforce their rights," said Lex Larson, president of Employment Law Research, a North Carolina concern that publishes manuals on labor law. "They go out and find another job, and forget the whole thing."

Experts say the growing reluctance of lawyers to take on job-bias claims is a trend that was intensified by a number of Supreme Court decisions making it harder for plaintiffs to bring such cases.

A bill to reverse these decisions has been stalled in Congress by a dispute over whether it would compel employers to adopt hiring and promotion quotas.

Many lawyers say they are hampered by two high court decisions.

The first, in 1982, limited their ability to bring large and potentially lucrative suits on behalf of whole classes of plaintiffs; the second, in 1988, virtually barred them from winning large monetary awards in race-discrimination suits, except those involving hiring.

Plaintiffs' lawyers also say they end up representing small individual claims brought by poor or working-class blacks or women who often cannot pay their normal rates. If they prevail, they often end up squabbling with judges over how much the losing party must pay them in fees.

"It's extremely difficult to earn a living in employment discrimination, virtually impossible," said Martha Pearson, an Atlanta lawyer.

EXHIBIT #1